UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

MISSION PRODUCE, INC. Employer

and Case 10-RC-095843

RETAIL WHOLESALE AND DEPARTMENT STORE UNION SOUTHEAST COUNCIL/UFCW Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board has considered an objection to an election held February 13, 2013, and the Regional Director's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 5 for and 1 against the Petitioner, with no challenged ballots.

The Board has reviewed the record in light of the exceptions and brief,¹ has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

¹ The Employer contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied, 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (2013). We likewise reject the Employer's related contention that the Regional Director would lack authority to process

We likewise reject the Employer's related contention that the Regional Director would lack authority to process representation petitions if the Board lacked a quorum. The Board's delegation of its decisional authority in representation cases to Regional Directors dates back to 1961 and has never been withdrawn. See 26 Fed. Reg. 3889 (May 4, 1961). Consistent with the 1961 Delegation, NLRB Regional Directors remain vested with the authority to conduct elections and certify their results, regardless of the Board's composition at any given moment. Furthermore, in *New Process Steel*, the Supreme Court expressly stated that such delegations were not affected by its decision, and, following that decision, no fewer than three courts of appeals have upheld the principle that Board delegations of authority to non-members remain valid during a loss of quorum by the Board. See *New Process Steel L.P. v. NLRB*, 130. S.Ct. 2635, 2643 n.4 (2010); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus*

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Retail Wholesale and Department Store Union Southeast Council/UFCW, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part-time warehouse employees, including packers, stackers, shipping clerks, truck drivers, and QA technicians, employed by the Employer at 3550 Southside Industrial Parkway, Suite 200, Atlanta, Georgia 30354; but excluding sales employees, office clerical employees, managers, professional employees, guards and supervisors as defined by the Act.

Dated, Washington, D.C., April 29, 2013.

	Mark Gaston Pearce,	Chairman	
	Richard F. Griffin, Jr.,	Member	
	Sharon Block,	Member	
(SEAL)	NATIONAL LABOR RE	NATIONAL LABOR RELATIONS BOARD	

v. Whitesell Corp., 639 F.3d 841, 844 (8th Cir. 2011); Overstreet v. El Paso Disposal, LP, 625 F.3d 844, 853 (5th Cir. 2010).